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Supreme Court, U.S.
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No. 04-928

In the Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

RANDY LEE GUZEK,

Respondent.

Petition for Writ of Certiorari to the Oregon Supreme Court

REPLY BRIEF

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TABLE OF CONTENTS

Page

Reply Brief 1

Conclusion 6

TABLE OF AUTHORITIES

Page

Cases Cited

State v. Guzek,
336 Or. 424, 86 P.3d 1106 (2004) 2, 4, 5

Constitutional and Statutory Provisions

Or. Rev. Stat. § 138.012(2)(b) 1

U.S. Const. amend. VIII 1, 2, 3, 4

REPLY BRIEF

Petitioner, the State of Oregon, has asked this Court to review the Oregon Supreme Court's decision, which holds that the Eighth Amendment requires admission of residual-doubt evidence in a capital penalty-phase proceeding. In response, Guzek contends that the state court's decision rests on state rather than federal law. Alternatively, Guzek asserts that the source of the state court's decision is ambiguous and the case should be remanded to permit the court to clarify the basis for its decision. To the contrary, as the State explained in the petition for writ of certiorari, the Oregon Supreme Court was unanimous in its recognition that it was deciding a federal constitutional question. It divided only on how the members of the court resolved that federal question.

Guzek makes two related assertions in response to the State's petition. First, he asserts that "although the ruling below was informed by federal law, it was premised on clauses of two state statutes." Brief in Opposition at 1-3. He points to a statutory basis for admitting one of the excluded pieces of evidence—testimony from his grandfather that would have established an alibi to place him somewhere other than the crime scene at the time of the murder. Brief in Opposition at 2. Guzek correctly notes, as did the Oregon Supreme Court, that a state statute authorizes the admissibility of a transcript of any witness's testimony from a prior proceeding in a new sentencing proceeding, including this evidence that the trial court excluded. Or. Rev. Stat. § 138.012(2)(b). Obviously, that state statutory ruling did not prompt the State to seek this Court's review, although the State agrees with the dissent

that the error was not prejudicial because the evidence was not relevant to any issue in the sentencing proceeding, and that determination turns on the federal constitutional issue raised in the State's petition for certiorari.

Of greater concern to the State is the breadth of the state court's holding that, in any subsequent penalty-phase proceeding, "*any* alibi evidence that defendant proffers in mitigation shall be admissible." *State v. Guzek*, 336 Or. 424, 464, 86 P.3d 1106 (2004) (emphasis added) (Appendix to Petition at App-64). This holding applies not only to whatever alibi evidence Guzek may offer in the subsequent penalty-phase proceeding in this case, but to any alibi evidence other capital defendants may offer in penalty-phase proceedings. For that reason, the State did not differentiate in its petition for writ of certiorari between the grandfather's alibi testimony, the alibi testimony of Guzek's mother that the state appellate court ruled admissible on federal constitutional grounds, and any other testimony Guzek and other defendants may offer under the court's ruling.

Guzek next urges this Court to deny the petition for writ of certiorari because he wants this Court to believe that "the source of the state appellate court's ruling is unclear or ambiguous" and, therefore, "the matter should be remanded for clarification." Brief in Opposition at 3-10. Under this section, Guzek offers an interesting—and generally contradictory—discussion of how the residual-doubt issue was presented to the Oregon Supreme Court. On the one hand, he asserts that he did not clearly present an Eighth Amendment residual-doubt claim to the state appellate court. On the other hand, he repeatedly states

that he did raise and preserve the Eighth Amendment claims. His point seems to be captured in the following statement: "While he certainly made reference to the Eighth Amendment and relevant case law of this Court, sufficient to preserve such arguments on higher review, it is clear from Mr. Guzek's briefing in this matter that neither party expected the Oregon Supreme Court to make this into a federal case." Opposition Brief at 7.

Guzek either raised the issue or he didn't. He cannot have it both ways. The State agrees that Guzek's brief in the Oregon Supreme Court was not a model of clarity and that the Oregon Supreme Court had to look closely to find the Eighth Amendment issue in the brief. Nonetheless, the State appellate court did find the issue and it squarely addressed it in an opinion that now controls the result in all Oregon trial courts faced with this issue. The parties may have been surprised that the Oregon Supreme Court addressed the issue, but the court did not overstep its bounds in addressing an issue that Guzek—as he appears to acknowledge—presented to it.

Thus, no remand is needed to permit the state appellate court to "clarify" the basis for its decision. The court could not be more explicit that it split over the precise federal question the State has presented in the petition for writ of certiorari. The majority described the issue before it as follows:

> Specifically, the legislature intended to ensure the admissibility of such evidence that the Eighth Amendment *requires* that a penalty-phase jury consider. The remaining question, then, involves a determination

> whether the alibi evidence that defendant proffered at his third penalty-phase proceeding—specifically, his mother's testimony—fell within that federal constitutional category. As explained below, the Supreme Court's Eighth Amendment jurisprudence suggests that defendant's alibi evidence is the type of evidence that a defendant is constitutionally entitled to introduce during the penalty phase for the jury's consideration.

Guzek, 336 Or. at 456-57, App-52 (emphasis in original). The majority then went on to discuss in detail this Court's case law and it concluded that the alibi evidence Guzek sought to introduce "was required to be considered by the jury under the Eighth Amendment." *Id.*, 336 Or at 462, App-61.

The dissent's opinion likewise rests without question on its analysis of this federal constitutional question:

> [The] history [of the state statute] establishes, as the majority acknowledges, that what the legislature intended to allow as "mitigating" evidence was precisely what the United States Supreme Court would require pursuant to the federal constitution; nothing more, nothing less. Thus, the true question in the case boils down to this: Would the United States Supreme Court, if faced with the question, hold that a defendant in the position of defendant here would be entitled, in a penalty phase proceeding, to assert that he should receive a sentence less than death because, in fact, he is innocent of the underlying crime?

Guzek, 336 Or. at 468-69, App-70 (Gillette, J., and Carson, C.J., concurring in part and dissenting in part). The dissent's analysis makes it simply unquestionable that, like the majority, its opinion rests strictly on its interpretation of the Eighth Amendment. A remand to the Oregon Supreme Court could in no way aide in this Court's review of the federal constitutional issue presented in the State's petition.[1]

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[1] The State is at a loss to understand the significance of Guzek's assertion that the Oregon Supreme Court "was sitting with only a quorum of five members, rather than a full seven-member court." Brief in Opposition at 8. The holding of the court has no lesser precedential value because two members were recused. And, even if this Court were to grant Guzek's request for remand of the case to the Oregon Supreme Court, the same five members would consider the case on remand.